In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1485

FRED DEMAIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 26–31) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1970. A petition for rehearing en banc was denied on March 27, 1970. The petition for a writ of certiorari was filed on April 27, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, where other evidence clearly showed petitioner's guilt of a substantive offense, the conviction should have been reversed because statements

mentioning petitioner were introduced on the conspiracy count.

2. Whether petitioner was improperly denied a severance.

STATEMENT

In an indictment returned in the United States District Court for the Northern District of Illinois, petitioner DeMaio, codefendants Braico, Routa and Fernandez, and unindicted coconspirator Garland were charged under Count I with a conspiracy to violate 18 U.S.C. 2315 by receiving the proceeds of a jewelry store robbery committed by Fernandez and Garland. Count II charged Fernandez alone with transporting the jewelry (18 U.S.C. 2314); Count III charged petitioner alone with receiving part of the stolen jewelry (18 U.S.C. 2315); and Count IV charged Braico and Routa with receiving part (18 U.S.C. 2315) (R. 2).[1] Fernandez and Garland were government witnesses. The jury found petitioner guilty on Counts I and III (R. 99) and Braico and Routa guilty on Counts I and IV (R. 100, 101). On November 15, 1968, petitioner was sentenced to imprisonment for concurrent terms of four years on Count I and five years on Count III, along with cumulative fines of $5,000 on Counts I and III (R. 104). On appeal the court of appeals reversed the convictions of petitioner, Braico and Routa on Count I on the ground that they were not part of one conspiracy. It

[1] "R" refers to the district court record in the companion case of *Braico and Routa* v. *United States*, No. 1887 Misc., O.T., 1969; and "Tr." to the two-volume transcript of the trial testimony in that case. "A." refers to petitioner's printed Appendix, which is on file with this Court in the instant case.

affirmed their convictions on Counts III and IV (receiving stolen property) (Pet. 26–31).

1. Prior to trial, petitioner and codefendants Braico and Routa filed a motion to dismiss Count I on the ground that a conspiracy had been improperly charged, and requested separate trials on the substantive charges in Counts III and IV (R. 6; A. 2, 11–13). These motions were denied (R. 44, 49; A. 2, 3). After the government's opening statement defendants renewed the motion to dismiss the conspiracy count (Tr. 17–19). At the close of the government's evidence, over defense objection, the court instructed the jury to disregard all limitations previously imposed upon the evidence and to consider all of the evidence relating to the conspiracy count against all defendants (R. 87; Tr. 775–778).

2. Evidence at the trial showed that on August 2, 1967, Fernandez and Garland robbed a store in Iowa, and obtained jewelry valued at $70,000 (A. 18, 29). They went to Chicago to seek a buyer for the stolen goods (A. 18). Fernandez registered under the alias of A. Bianco at the Breakers Motel (Gov. Ex. 30), where he made a telephone call to petitioner DeMaio, whom he and Garland knew as Frank Diamond (Tr. 62–63, 65–66). On the following day Fernandez again telephoned petitioner, stated that he had $60,000 to $70,000 worth of jewelry, and arranged for a meeting that evening (Tr. 77–78).

At the meeting in the basement of petitioner's home petitioner asked Garland if the jewelry was a "safe load." Garland replied that it was, and that it came from "out of town" (Tr. 411–412). Garland also stated that there was nothing about the stolen jewelry in the

paper or on the radio, and that it was a "big load of jewelry" (Tr. 412). Fernandez and Garland sold to petitioner approximately a third of the jewelry, worth about $25,000, for $2,200 (Tr. 80, 412–413). That night they were paid $1,600, and arrangements were made for the remaining $600 to be paid the following evening (Tr. 83, 414). Both Fernandez and Garland testified that petitioner wanted to buy the rest of the jewelry for $3,500, but they refused his offer (Tr. 82, 414). Petitioner told them to come back for a further talk if they could not get rid of the rest of the load, and Fernandez replied, "O.K." (Tr. 82). When petitioner paid Fernandez the $600 balance in $100 and $50 bills, he inquired if Fernandez had disposed of the remainder of the jewelry and Fernandez told him he had not. Petitioner said, "Well, if you don't, let me know" (Tr. 91).

About 15 or 20 minutes later Fernandez and Garland met Braico and Routa (Tr. 91–93, 435). When Fernandez asked Braico if he could get rid of a load of jewelry for him, Braico said he thought he could, but that he would have to make some phone calls first (Tr. 94). Later at a meeting of Fernandez and Garland with Braico and Routa, Braico said, "Why didn't you tell me that you sold part of the load to Frank Diamond [petitioner]? * * * That's why we are having trouble getting rid of the load, because Frank Diamond had put the word out * * * that he could get the load for $3,500 and that it had messed us up a little bit with other people * * *." (Tr. 97–98, 440–442.)[2] After further bargaining, Braico finally paid Fernandez and Garland

[2] This evidence was admitted over petitioner's objection.

$4,500 for the remaining unsold jewelry (Tr. 99, 370–372, 449; A. 21).

ARGUMENT

1. The testimony as to Braico's statement set forth above, to the effect that he was having trouble because the thieves had sold part of the load to petitioner, was admitted on the conspiracy count. Petitioner argues that because of this fact, the finding by the court of appeals that he did not conspire with Braico requires reversal of his conviction on the substantive count. There was, however, ample independent evidence from which the jury could reasonably find petitioner's guilt on the substantive count. The jury heard testimony by the thieves, Fernandez and Garland, that petitioner willingly cooperated by purchasing about $25,000 worth of the stolen jewelry for $2,200 and had a continuing interest in purchasing the remaining portion for $3,500. The same witnesses testified to the Braico statement. If the jury believed Fernandez and Garland, their testimony as to what Braico said added nothing. It is thus unrealistic to contend that introduction of the Braico statement resulted in any substantial prejudice to petitioner's case. Even if its introduction was error, the error was harmless beyond a reasonable doubt. *Harrington* v. *California*, 395 U.S. 250; *Chapman* v. *California*, 386 U.S. 18.

2. The contentions relating to the alleged improper denial of a severance are answered in the government's brief in opposition in the companion case, No. 1887 Misc., O.T., 1969, pp. 4–5.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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